No. 80-5950

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LAVERNE L. LOGAN,

Appellant,

VS.

ZIMMERMAN BRUSH COMPANY,

Appellee.

On Appeal From The
Supreme Court Of Illinois

BRIEF FOR CONGRESS OF ORGANIZATIONS OF THE PHYSICALLY HANDICAPPED AND CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, INC. AS AMICUS CURIAE

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STATEMENT OF INTEREST

The Illinois Congress of Organizations of the Physically Handicapped ("COPH") is comprised of 32 organizations and approximately 4,000 individual members. COPH seeks to promote the civil rights of all physically handicapped individuals. COPH provides counseling and referral to handicapped individuals, many of whom are unemployed or under-employed as a result of unlawful discrimination. COPH seeks to file this brief amicus curiae in order to assert the significant interest of the handicapped in preventing the arbitrary dismissal of charges of employment discrimination.

Chicago Lawyers' Committee for Civil Rights Under Law, Inc. ("Lawyers' Committee") is comprised of approximately 50 Chicago law firms. In recent years, the Chicago Lawyers' Committee has devoted substantial attention to the area of employment discrimination.

For instance, the Lawyers' Committee has been involved in class action litigation concerning the hiring and promotion of minorites by the Chicago Police and Fire Departments and concerning Equal Pay Act and Title VII discrimination practiced against women employees of the City of Chicago.

While the Lawyers' Committee represents poor, minority and handicapped persons in class action litigation, it also recognizes that it is impossible for such persons to find counsel on every occasion when vindication of their rights is necessary. The Lawyers' Committee therefore urges reversal of the decision below which creates insuperable barriers to the ability of Illinois residents to pursue without counsel state law remedies for discrimination.

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SUMMARY OF THE ARGUMENT

On September 29, 1980, the Illinois Supreme Court issued a writ of prohibition barring the Illinois Fair Employment Practices Commission ("FEPC") from ever reaching a decision on the merits of appellant Laverne Logan's charge of handicap discrimination under the Illinois Fair Employment Practices Act , Ill. Rev. Stat. ch. 48, §§ 851-867 (1979)) (repealed by and re-enacted as the Illinois Human Rights Act, Ill. Rev. Stat. ch. 68, § 1-101 to § 9-102, (effective July 1, 1980)("the FEPA"). Although Mr. Logan had complied with all procedural requirements in a timely fashion, he was unable to obtain any decision on the merits of his claim because the FEPC had failed to perform its statutory duty of convening a fact finding conference within 120 days of the filing of the charge of discrimination.

The Illinois Supreme Court decision thus deprives parties charging discrimination of rights accorded them by Illinois law: the right to employment opportunity free from discrimination based upon handicap and the right to a cause of action to secure such opportunity. The dismissal of Mr. Logan's discrimination charge without any adjudication on its merits denies him due process of law under the tests articulated by this Court.

Under the standard outlined in Mathews v. Eldridge, 424 U.S. 319 (1976), such a dismissal violates due process because it deprives an individual of substantial rights, without any procedural safeguards and with negligible gains in administrative efficiency. The decision of the Illinois Supreme Court also must fall under the due process test suggested by this Court in Martinez v. California, 444 U.S. 277 (1980): the State cannot de-

prive an individual of property or liberty interests for reasons which are irrational or arbitrary.

The termination of a charging party's rights under the FEPA because the FEPC has not met its own time limits does not further the goal of just resolution of employment disputes; such terminations have nothing whatsoever to do with the merits of the charge. Neither does such a dismissal promote the efficiency of the FEPC except in the sense that a total bar to the filing of charges or the random dismissal of such charges could be said to promote administrative efficiency.

Dismissal on this basis deprives a charging party of any right under the FEPA to pursue his discrimination charge against his former employer. This deprivation is particularly serious in the case of individuals alleging discrimination on the basis of physical handicap because

such persons are barred from any remedy under federal law. The reversal of the opinion below thus is essential to the vindication of the rights of many Illinois residents, and particularly of those who are unemployed or under-employed as a result of discrimination based upon their physical handicap.

I. THE ILLINOIS SUPREME COURT'S DECISION DENIES THE RIGHT OF ILLINOIS HANDICAPPED PERSONS TO BE FREE FROM DISCRIMINATION IN EMPLOYMENT.

Appellant Laverne Logan's status as a handicapped person seeking redress from employment discrimination is central to the due process and equal protection issues raised in this appeal. Handicapped residents of the State of Illinois, under current state and federal law, have only one legal remedy for employment discrimination in cases such as this one, that is, cases which involve private employers

with no federal contracts or federal financial assistance. That remedy is the Illinois Human Rights Act, Ill. Rev. Stat. ch. 68, §1-101 to §9-102 (effective July 1, 1980), ("Human Rights Act"). The predecessor of this act in effect at the time of Mr. Logan's charge was the Illinois Fair Employment Practices Act, which provided equivalent protection against employment discrimination based on handicap.

While other protected groups, such as blacks, Hispanics, and women, have legal remedies other than those provided in the FEPA/Human Rights Act, Mr. Logan and other handicapped persons do not. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e to 2000e-17 (1976), does not prohibit discrimination in employment based on handicap. The Rehabilitation Act of 1973, 29 U.S.C. § 701 (1976) does prohibit handi-

cap discrimination in employment but only with regard to companies or entities which have federal contracts or which receive federal financial assistance. The Illinois Supreme Court has placed in jeopardy the only protection from employment discrimination of handicapped persons in Illinois by deciding that negligence by the Illinois Fair Employment Practices Commission can extinguish that protection.

Discrimination against the handicapped in employment is pervasive and thoroughly entrenched in our society.[1/] More than twenty million Americans are physically or mentally handicapped.[2/] Despite the large number of handicapped persons in society, their employment

1/ Gittler, Fair Employment and the Handicapped: A Legal Perspective, 27 DePaul L. Rev. 953, 954 (1978) [hereinafter cited as "Fair Employment"].

2/ Note, Protecting the Handicapped from Employment

(Footnote continued on next page)

rate is extremely low. Conservative estimates place at 7.2 million the number of handicapped persons able to work, yet only 800,000, or one in nine, are actually employed.[3/] Employer fears and stereotyping of handicapped persons have been long recognized as impediments to the ability of the handicapped to obtain employment.[4/]

(Footnote 2 continued from previous page)

Discrimination in Private Sector Employment: A Critical Analysis of Section 503 of the Rehabilitation Act of 1973, 54 Tul. L. Rev. 717, 717 n.1 (1980) [hereinafter cited as "Protecting the Handicapped"]; United States Office of Personnel Management, Handbook of Selective Placement of Persons with Physical and Mental Handicap in Federal Employment 1 (1979).

3/ Protecting the Handicapped, supra, note 2 at 717 n.1; S. Rep. No. 2197, 93d Cong. 2d Sess. 34 (1974) reprinted in [1974] U.S. Code Cong. & Ad. News 6373, 6408.

4/ Nagi, McBroom & Collette, Work Employment and the Disabled, 31 Am. J. Econ. & Soc. 21, 27 (1972); Olshansky, Grob & Malamud, Employers' Attitudes and Practices in the Hiring of Ex-Mental Patients, 42 Mental Hygiene 391, 394-95 (1958); Richard, Triandis & Patterson, Indices of Employer Prejudice Toward Disabled Applicants, 45 J. Applied Psych. 52 (1953).

As noted by one commentator,

> An employer's refusal to hire or promote a handicapped person is premised on a variety of factors including fears of increased costs, safety and stereotyping assumptions which frequently underestimate the capabilities of a handicapped person. 5/

The Illinois Supreme Court by its decision has impaired seriously the ability of handicapped persons to overcome such unfounded assumptions since it leaves the rights of the handicapped at the mercy of bureaucratic indifference.

The Illinois Supreme Court's decision in this case is premised upon its opinions in Springfield-Sangamon County Regional Plan Commission v. Fair Employment Practices Commission, 71 Ill. 2d 61, 373 N.E. 2d 1307 (1978), and Board of Governors v. Illinois Fair Employment Practices Commission, 78 Ill. 2d 143, 399 N.E. 2d 590 (1979), which held that a party's charge of discrimination

5/ Fair Employment, supra, note 1 at 968 n.1.

must be dismissed when the FEPC does not issue a complaint within 180 days of the filing of the discrimination charge.[6/] The court in Springfield-Sangamon interpreted the 180 day limit on the issuance of a complaint finding substantial evidence of discrimination as a statute of limitations which serves to divest the FEPC of jurisdiction. Although Mr. Logan's case does not concern the 180 day limit on the issuance of the complaint but rather the 120 day limitation on the FEPC's conducting a fact-finding hearing, the Illinois Supreme Court applied the Springfield-Sangamon principle in interpreting the 120 day time limit. It is this principle, that inaction by the FEPC can extinguish the rights of a charging party who has complied with all the re-

6/ The Human Rights Act has extended the time for issuance of a complaint from 180 days to 300 days of the filing of an initial charge. Ill. Rev. Stat. ch. 68, §7-102(G) (effective July 1, 1980).

quirements of the FEPA/Human Rights Act, which is at issue in this preceeding.[7/]

Thus due solely to the negligence of the Illinois Fair Employment Practices Commission, Mr. Logan and untold numbers of other handicapped persons in Illinois[8/],

7/ The Illinois Supreme Court has left open the question whether the 120 day limit on convening a fact-finding conference remains mandatory in light of the amendment to §7-102(c)(3) of the Human Rights Act which became effective July 1, 1980. (Appendix to Jurisdictional Statement at 6a) Regardless of how the 120 day limitation is interpreted, the Springfield-Sangamon decision still will operate to deny handicapped persons any cause of action for discrimination should the FEPC fail to issue a complaint within 300 days of the filing of a charge.

8/ The statistics for charges filed indicate the significance of the FEPA remedy to handicapped Illinois residents. In state fiscal year 1977 (July 1, 1976- June 30, 1977), 211 individuals filed charges alleging handicap discrimination; this number represented 10% of all charges filed with the FEPC. In fiscal year 1978, 348 handicap charges, representing 20% of all charges, were filed, and in fiscal year 1979, 349 handicap charges, representing 15% of all charges, were filed. These statistics do not include charges of handicap discrimination filed in conjunction with charges of race or sex discrimination. Illinois Fair Employment Practices Commission, Seventeenth Annual Report 14; Illinois Fair Employment Practices Commission, Eighteenth Annual Report 14.

have been or will be stripped of their only protection against discrimination. Such a result is grossly unfair, particularly in light of the fact that large numbers of these persons, like Mr. Logan, will not have the assistance of a lawyer in the FEPC proceedings. To expect such individuals to know the procedural requirements the FEPC must meet, in addition to those which must be followed by a charging party, is unrealistic and unfair. This Court recently stated in Hughes v. Rowe, __U.S.__, 66 L.Ed. 2d 163, 173 (1980), "An unrepresented litigant should not be punished for his failure to recognize subtle factual or legal deficiences in his claims." Certainly, a pro se party to an administrative proceeding is no more worthy of punishment when the error is not of his own making or even within his power to correct.

The Illinois Supreme Court's decision subverts the pro se nature of the administrative procedure established by the FEPA. In a real

sense, the decision rewards the FEPC for inefficiency since the FEPC can dispose quickly of excess cases simply by doing nothing. The FEPC has no accountability to charging parties; it does not represent them. Rather, it acts as a neutral third party which investigates the charges and determines whether a complaint is warranted. Handicapped persons cannot in fairness have their rights made contingent on the FEPC's taking action within 120 days.

II. THE DECISION OF THE ILLINOIS SUPREME COURT, TERMINATING CHARGES OF EMPLOYMENT DISCRIMINATION AS A RESULT OF THE INVESTIGATING STATE AGENCY'S FAILURE TO MEET STATUTORY TIME LIMITS, DEPRIVES PARTIES ALLEGING DISCRIMINATION OF THEIR RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Mr. Logan, as a result of the action of the Illinois Fair Employment Practices Commission, lost his right to an adjudication of his charge of employment discrimination under the FEPA. The FEPC failed to convene a fact-finding conference within 120 days of Mr. Logan's filing of his charge, and the

Illinois Supreme Court ruled that, as a consequence, the FEPC must terminate processing of Mr. Logan's charge without any ruling on its merits. If the Illinois Supreme Court's decision is not reversed, large numbers of individuals will be barred, through no fault of their own, from ever asserting their right under the Illinois FEPA to be free from employment discrimination. See Section I, supra at 9-10. In fact, those Illinois residents who, like Mr. Logan, claim discrimination based upon physical handicap, will lose their right to proceed in any forum to assert their legal claim. See Section I, supra at 5-6. The state thus has deprived such individuals of significant rights without due process in violation of the Fourteenth Amendment.

This Court has used a two part analysis in determining whether governmental action violates the Due Process Clause. First, the court must find that a protected

property or liberty interest has been injured and, second, the court must determine whether or not adequate protections have accompanied the deprivation effected by the state. Ingraham v. Wright, 430 U.S. 651, 672 (1977).

Mr. Logan's right to proceed to an adjudication of his discrimination claim is a property right which the Illinois General Assembly has afforded him. As this Court stated in Board of Regents v. Roth, 408 U.S. 564, 571-72 (1972):

> The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.

FEPA accorded Mr. Logan the property rights of employment conditions free from discrimination on the basis of handicap and a cause of action to secure such conditions. Such rights have the attributes of property interests in employ-

ment or government benefits which this Court has described as protected by the Due Process Clause:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.9/

Board of Regents v. Roth, 408 U.S. at 577.

Mr. Logan's expectation that Illinois law would protect him from discrimination based upon his handicap was not mere wishful thinking on his part. Ill. Rev. Stat. ch. 48, §853 (1979) provides:

9/ The line between property interests and liberty interests protected by the Due Process Clause may be difficult to discern, Paul v. Davis, 424 U.S. 693, §710 (1976). Appellant has shown in his brief that he has been deprived of an interest in liberty as well as an interest in property. Regardless of how the interest in the discrimination claim is characterized, however, it is one which is protected by the Fourteenth Amendment.

> It is an unfair employment practice: (a) For any employer, because of the race, color, religion, sex, national orgin, ancestry or physical or mental handicap unrelated to ability of an individual, or an unfavorable discharge from military service to refuse to hire, to segregate, or otherwise to discriminate against such individual with respect to hire selection and training for apprenticeship in any trade or craft, tenure, terms or conditions of employment.

In addition, Ill. Rev. Stat. ch. 48, §856.07 (1979) lists among the powers and the duties of the FEPC, "To issue, receive, investigate and determine charges [of unlawful discrimination] filed with it in conformity with this Act." Finally, Art. 1,§12 of the Illinois Constitution guarantees:

> Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely and promptly.

In fact, the General Assembly created the right to be free from employment discrimination long before it imposed the 120 day

time limit governing when fact-finding[10/] conferences must be held, a limit which it modified substantially only two years later. See Section I, supra at 10 n.7.

This Court has recognized that such state-created causes of action may constitute property within the meaning of the Fourteenth Amendment. In Martinez v. California, 444 U.S. 277, 281-82 (1980), the Court stated in dicta: "Arguably the cause of action for wrongful death that the state has created is a species of 'property' protected by the Due Process Clause." The Court said that the state's ability to deprive an individual of property is subject to

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10/ The FEPA originally was enacted in 1961. 1961 Ill. Laws 1845. In 1975, the General Assembly amended the law to prohibit discrimination on the basis of handicap unrelated to ability. P.A. 79-186, §1. In 1978, the Act was further amended to require the FEPC to convene a fact-finding conference within 120 days of the filing of a discrimination charge. P.A. 80-1452, §1.

the "federal [constitutional] interest... in protecting the individual citizen from state action that is wholly arbitrary or irrational." Martinez v. California, 444 U.S. at 287.

The Court went on to hold that if a wrongful death action did constitute property, a state could erect barriers to such an action consistent with the requirements of Due Process only if the barriers furthered another rational and legitimate state policy. In that case, the Court ruled that a parole board's immunity to a wrongful death law suit rationally furthered the state policy of allowing the parole board wide discretion in deciding whether or not to accord parole.

In this case, however, in depriving Mr. Logan of any right to a determination of his discrimination charge, through no fault of his own, the FEPC has acted in a manner which is totally arbitrary and irrational.

The Illinois Supreme Court asserted that it could find two justifications for dismissing a charge because the FEPC inadvertently had failed to convene a fact finding conference within 120 days. In fact, the Illinois Supreme Court's action in dismissing a charge under these circumstances and depriving parties alleging discrimination of their rights serves no legitimate state purpose whatsoever.

The Illinois Supreme Court first suggests that the dismissal promotes the just and expeditions resolution of employment disputes. Such a dismissal, however, cannot be seen to promote a "just" resolution of a dispute, since the dismissal has no connection whatsoever to the merits of the charge,[11/] and is not a

11/ The Illinois Supreme Court also suggests that the dismissal based on the FEPC's failure to comply with time limits serves the purpose of protecting employers from unfounded charges

(Footnote continued on next page)

"resolution" of the charge in any sense other than that in which an arbitrary, baseless death knell may be "expeditious."

This Court has recognized that efficiency itself cannot justify the deprivation, without certain protections, of rights or property protected by the Due Process Clause. In Stanley v. Illinois, 405 U.S. 645, 656-57 (1972), the Court stated:

> [T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the over-bearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

(Footnote 11 continued from previous page)

of discrimination. Appendix to Jurisdictional Statement at 6a. Again, since processing of the charge is terminated with no determination whatsoever with regard to the merits, there is no reason to believe that any charge so dismissed was unfounded. This sort of dispute resolution can be deemed "just" or deemed to "protect employers from unfounded charges," in the same respect that a total bar to the filing of charges could be said to accomplish these purposes.

> Procedure by presumption is always cheaper and easier than individualized determination .

The Court in Mathews v. Eldridge, 424 U.S. 319, 335 (1976), set forth a slightly different measure of the due process requirements which a state must meet before it can deprive a person of property.

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

The private interests at stake here, the right to freedom from employment discrimination and to a procedure to vindicate that right, are also the public policy of the State of Illinois, as reflected in its

statutes and constitution.[12] The risk of an erroneous deprivation of this right is enormous; the FEPC reaches no determination on the merits of the terminated discrimination charge and utilizes no procedural safeguards to reduce the likelihood of error when the charge is terminated because of agency delay.

To be weighed against this total deprivation of private and public interests are the state's administrative interests. The court in Eldridge, 424 U.S. at 348, stated:

> Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But...[a]t some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost. (emphasis added)

12/ See Ill. Rev. Stat. ch. 48, §851 (1979). See p. 16, supra.

The parties whose charges have been dismissed as a result of the FEPC's failure to meet a time deadline have not simply been denied "an additional safeguard." While administrative cost factors may serve to limit the number of procedural protections accorded someone affected by government action, such administrative considerations cannot justify what has occurred in this case: the obliteration of rights without any process whatsoever.[13/]

The state's interest in administrative efficiency has been accorded significance by this Court in instances in which state

13/ Thus the state law-accorded property right of employment conditions free from discrimination and of processing of a discrimination charge cannot be eliminated constitutionally by state procedural law.

The situation in this case thus is distinguishable from that described by the plurality opinion in Arnett v. Kennedy, 416 U.S. 134 (1974). In Arnett, a civil service employee's statutory right to be discharged only for cause was limited by a procedural statute which accorded him only post-termination consideration of whether this right had been violated. In this case, the rights to pursue employment free from discrimination and to processing of a discrimination claim were not limited, but rather were nullified completely by procedural rule.

procedural rules do not bar completely any possibility of redress of a party's grievance. In Lindsey v. Normet, 405 U.S. 56 (1972), for example, this court ruled that Oregon did not violate the requirements of due process when it limited the defenses and counterclaims a tenant could assert in summary eviction proceedings. The Court reasoned that these rights were not forever lost to the tenant since he was "not foreclosed from instituting his own action against the landlord and litigating his right to damages or other relief in that action." Id. at 66. This situation is completely different from that of Illinois residents charging handicap discrimination who can lose all state law rights with respect to their charge if the decision below is upheld.

The Illinois Supreme Court's decision thus has created a situation which is comparable to that of parties to litigation

who, through no fault of their own, have failed to comply with discovery requests and as a consequence have had their claims dismissed. This Court has stated that such a dismissal contravenes not only the federal rules governing discovery but the requirements of due process as well. In Societe Internationale Pour Participations Industrielles v. Rogers, 357 U.S. 197, 209 (1958), the Court held that a petitioner's claim could not be dismissed as a sanction for not producing requested documents when the petitioner was unable to secure the documents.

> The provisions of Rule 37 [of the Federal Rules of Civil Procedure] which are here involved must be read in light of the provisions of the Fifth Amendment and that no person shall be deprived of property without due process of law, and more particularly against the opinions of this Court in Hovey v. Elliott, 167 U.S. 409, 42 L. Ed. 215, 17 S.Ct. 841 and Hammond Packing Co. v. Arkansas, 212 U.S. 322, 53 L.ed. 530, 29 S. Ct. 370,

> 15 Ann Cas 645. These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.14/

The Illinois Supreme Court ruling here, based on the FEPC's failure to schedule a timely fact-finding conference,has barred individuals alleging handicap discrimination from any administrative or judicial action whatsoever under Illinois law. They cannot present their unresolved discrimination charge to any other forum. In short, the FEPC has deprived such persons completely of any ability to assert their state constitutional and statutory claimsof employment discrimina-

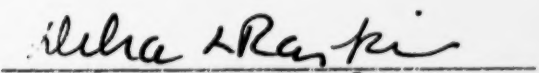
14/ The Court in Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1908) authorized entry of a default judgment against a defendant who failed to produce documents but noted that the defendant had not been punished "for a failure to do that which it may not have been in its power to do." 212 U.S. at 315.

tion. Individuals whose charges have been dismissed due to the FEPC's malfeasance thus are in a situation substantially worse than that of a party charging discrimination who has received an adverse decision from the FEPC; such an individual at least is entitled to seek judicial review of the FEPC's action. Ill. Rev. Stat. ch. 48, §860 (1979). This result constitues arbitrary and irrational governmental action which denies due process of law to individuals whose discrimination charges are dismissed as a result of the FEPC's negligence.

III CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

Respectfully submitted,



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